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Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union

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FOREIGN INVESTMENT ISSUES FOR INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS: INTERNATIONAL HEALTH PROJECTS IN CHINA AND THE FORMER SOVIET UNION

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I. INTRODUCTION

Non-governmental organizations (NGOs)[1] engaged in international investment projects confront significant and unique challenges. Similar to for-profit enterprises, NGOs active in foreign contexts face problems and uncertainties commonly encountered by international investors.[2] Although NGOs conduct international projects for different purposes than for-profit investors, they engage in many of the same activities in foreign countries. These activities include the purchase and use of property, importing or exporting

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[1] A variety of terms are used to describe entities that this paper will refer to as NGOs. These terms include "not-for-profit," "private volunteer organization," "charitable organization," "foundation," "civic organization," "third sector organization," "international agency,""civic society organizations," and "international organization". While these terms are often used interchangeably, they may suggest distinctions in the function, status, or context of the organization. Additionally, different sectors and disciplines may use one or more of these terms exclusively. This paper focuses on a U.S.-based private volunteer organization, registered as a non-profit organization under 501(c) of the U.S. Internal Revenue Code, engaged in charitable activities in the field of international health. *See generally* THE INT'L CTR. FOR NOT-FOR-PROFIT LAW, THE BLUEPRINTS PROJECT, ISSUE PAPER (1994).

[2] A broad definition of "foreign investment" may include the foreign project activities of NGOs. *See* Ewell E. Murphy, Jr. *The Andean Decisions on Foreign Investments: An International Matrix of National Law*, 24 INT'L LAW. 643, 646 (1990).

goods, creating employment relationships and contracting for services in the host country.

Due to their restricted legal status in some foreign countries, or incomplete host country regulations, NGOs must overcome problems specific to their goals and the legal context in which they function. These problems involve tax issues, customs exemptions, legal status and recognition, dispute resolution, host country agreements, insurance and import/export controls. Many of these issues create persistent or potential difficulties for international NGOs involved in investment like activities.

In certain aspects of foreign investment, NGOS have advantages over for-profit international investors. Because of their valued humanitarian and volunteer activities, issues traditionally problematic for international investors[3] are often mitigated and more easily overcome by NGOs. Such advantages, however, usually depend on particular foreign contexts, may be uncertain and may change with local political dynamics.

Despite these advantages, the incomplete legal regime related to NGO foreign investment activities in many countries (and under international law), as well as the difficulty of applying commercial law to NGOs and their activities, create impediments and uncertainty for NGOs engaged in international projects. The risks and complications associated with international NGO activities, and their extensive international role, necessitate consideration of the foreign investment issues encountered by NGOs.

This paper focuses on the foreign investment activities of U.S.-based NGOs involved in international projects, the types of issues they encounter and some possible solutions to problems that can and often do arise. Specifically, the activities of U.S.-based NGOs involved in international health projects highlight the types of problems international NGOs encounter. Case studies of the former Soviet Union and China indicate the nature of these problems.

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[3] *See* John A. Westberg & Bertrand P. Marchais, *General Principles Governing Foreign Investments as Articulated in Recent International Tribunal Awards and Writings of Publicists*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 453 (1992).

The examples discussed in Section IV indicate certain types of problems and issues unique to international NGOs working in the former Soviet Union and China. These examples suggest that such issues should be examined in other foreign contexts to determine the extent these or other issues confront international NGO projects in particular host countries. These examples also show the importance of host country agreements and the precarious status of international NGOs under the laws of many foreign countries.

Section V discusses the applicability of international commercial law to NGOs. It argues that international arbitration may mitigate some of the problems NGOs encounter in disputes with host governments and in difficulties relating to their lack of legal status. Section V also argues that international commercial laws relating to arbitration may not apply to international NGOs or offer adequate protection. Although this paper touches on a number of significant issues indicated by the case studies presented in Section IV, the use of international arbitration as a means of dispute resolution and the problems of national and international legal status or recognition for international NGOs serve as the focus of this paper.

In sum, this paper discusses the general nature of NGOs, including their domestic and international status and their contrasts with for-profit entities. Second, it considers the agreements created by international NGO projects, and the issues they address.

Third, it explores the problems and risks indicated by international NGO projects and agreements related to them. Fourth, projects conducted by an international health NGO in China, Kazakstan[4] and Uzbekistan show the types of foreign activities conducted by international NGOs and the issues they raise. Finally, provision in international commercial instruments important to NGO foreign activities and considerations for NGOs related to international arbitration are explored.

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[4] The Kazakstan Republic recently changed the spelling of its name from the Russian "Kazahkstan". The new spelling is used here.

II. NON-GOVERNMENTAL ORGANIZATIONS

One important distinguishing feature of NGOs is the non-profit purpose of their activities. While some activities of NGOs are similar in nature to for-profit commercial activities, their purpose differs significantly from that of for-profit enterprises. Even in their revenue-generating activities, NGO functions ultimately relate to their essential non-profit mission.[5] Because of this distinct purpose, NGOs take on different functions and activities, operating in fields and areas that may be unusual for commercial entities.

Additionally, the organization and legal setting of NGOs differ from those of for-profit corporations. Much of the powers, capabilities and structure of an NGO depends on the laws under which it is established or registered. Examples of such registration include section 501(c) of the U.S. Internal Revenue Code, registration for consultative status with the U.N. Economic and Social Council and registration in foreign legal systems.[6]

Although NGOs are domestic in organization and status, they may be international in the focus of their activities. While NGOs are increasingly active internationally, NGOs are entirely defined and established by national law.[7] Despite a proliferation of international NGOs, no international legal regime exists for recognizing the status of NGOs under international law.[8] However, a number of regional

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[5] This principle of tax-exempt status for income generating activities related to an NGO's mission is incorporated in the U.S. Internal Revenue Code, § 501(c) and non-profit laws of other countries, including the 1994 Russian Civil Code. *See* Yevgeny Sukhanov, *Nonprofit Organizations in Russia: Property and Legal Status, in* NGO LAW IN BRIEF IN THE NEW INDEPENDENT STATES, World Learning Inc., Forum I, Winter 1995.

[6] *See e.g.*, Law Concerning Social Organizations in the Republic of Uzbekistan, adopted Feb. 15, 1991, Chapter 5; Law on Public Associations of the Republic of Kazakstanm June 27, 1991.

[7] *Id.* at 328.

[8] Limited regional instruments exist on the recognition of international NGOs; *see* note 30 , *infra* and Beigbeder, note 10, *infra* at 331-33. Two international NGOs receive some recognition under international law: the International Committee of the

proposals and initiatives have been made to establish a mechanism to recognize and protect NGOs by multilateral agreement.[9]

Where and how an NGO is registered and organized also provides a means of categorizing NGOs. Other methods of categorizing NGOs include their purposes and functions, their relationship to government activities and their stage of evolution.[10] Such categories are important in distinguishing the types of activities NGOs conduct, their legal rights and the likely problems they may encounter.

In the absence of a widely accepted international agreement on the recognition and legal status of international NGOs, such groups engaged in international projects must rely on and derive their legal personality and status from NGO laws in foreign host countries, or from host country agreements. Unfortunately, foreign NGO laws are inconsistent and often do not provide adequate protection, and host country agreements may be difficult to obtain or enforce.

Such laws, aside from lacking comparative uniformity, may pose three essential problems. First, foreign countries may not have any laws relating to NGOs. Second, even if a host country has laws governing NGOs, they may only cover domestic NGOs and not have provisions for foreign based international NGOs. Finally, host country laws may be incomplete and inconsistent in application, or unnecessarily restrictive.

Where laws on NGOs exist, they may provide a variety of benefits for international NGOs. These benefits may include laws allowing recognition[11], tax exemptions to the NGO, its employees or

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Red Cross under the Geneva Conventions, see note 10, *infra* at 61-78, and the International Olympic Committee, *see* David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97.

[9] *See* note 10, *infra.*

[10] *See generally* YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 79-94 (1991) (discussing NGO typologies).

[11] *See Special Provision of the President of Kazakstan On Order of State Registration of Legal Persons by Agencies of the Ministry of Justice*, July 14, 1995, providing for recognition of NGOs. Anaylsis of the Legislation of the Republic of

transactions, tax benefits to donors as an incentive to make contributions, legal personality, and exemption from customs and other fees. Such benefits may also derive from specific agreements between the host government and the international NGO. Of particular importance is the legal personality and certainty accorded the international NGO by adequate foreign laws or a comprehensive host country agreement.

NGOs active internationally have important similarities with for-profit foreign investors. Often, NGOs and for-profit entities engage in similar projects, such as constructing and operating facilities, training and managing personnel, and importing or exporting materials and supplies. Both types of investors confront common infra structural or logistical problems, similar cost and administrative concerns, and the potential for host country discrimination against foreign investors.

Both NGOs and for-profit investors may also suffer under laws providing limited legal status and rights and face difficulty when disputes arise with foreign parties or the host government. As one observer notes, in reference to the dispute resolution difficulties confronting international NGOs:

> When an international agency [NGO] contracts with a sovereign government, the international agency has no means of enforcement or recourse against that government if that government breaches its contractual duties, except for remedies made available by the government itself. In this context, the NGO is in a situation similar to that of a private investor. . .[12]

Kazakstan on NGOs, prepared by InterLegal, Kazakstan, 1995.

[12] Gregory W. MacKenzie, Note, *ICSID Arbitration as a Strategy for Leveling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT'L L. & COM. 197, 205 (1993).

[13] *See* Jeswald W. Salacuse, *Host Country Regulation and Promotion of Joint Ventures and Foreign Investment, in* JOINT VENTURING ABROAD: A CASE STUDY (David N. Goldsweig ed., 1985).

NGO and for-profit investors also employ similar contracts, confront parallel dispute resolution problems and face difficulties from the inadequacies or restrictions of local corporate or NGO laws.[13]

As noted above, NGOs may find themselves in a privileged position because of their altruistic, non-profit mission. Conversely, in some instances, host countries in transition from state-controlled economies may initially pay more attention to developing a positive climate for commercial investors in order to attract international investment, thus neglecting NGOs or failing to provide them adequate legal protection or status. NGOs and for-profit entities may also have different organizational structures, bottom-line concerns, types of activities and roles or functions of their contracts. Such differences can make for-profit investors less disadvantaged in some foreign contexts.

Given these similarities and differences, NGOs confront unique problems in international projects. These problems arise from the absence of laws relating to NGOs, host country laws that provide limited standing to sue and create or enforce contracts, and foreign unfamiliarity with NGOs. Unique problems confronted by international NGOs also arise with the difficulty of applying international commercial law to NGOs.

Where NGO laws do not exist, NGOs may sometimes find protection in international instruments relating to commercial transactions and the commercial laws of the host country. The extent of this protection and the application of commercial laws to NGO activities depends on whether key provisions can be interpreted broadly to include not-for-profit activities. Thus, for example, the definitions of "investment" under Article 25 of the International Center for the Settlement of Investment Disputes Convention (ICSID Convention), and "commercial" under reservations to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) may determine the applicability of these instruments to NGO foreign activities.

Additionally, NGOs may be covered by foreign incorporation

laws that use such terms as "association" or "entity". However, even where applicable to international NGOs, international and foreign commercial law may not provide the benefits or protections necessary to make humanitarian work as effective as it might be otherwise. The examples below highlight these problems in the context of NGO international health programs.

III. TYPICAL AGREEMENTS AND CONTRACT ISSUES

The NGO international health programs outlined in Section IV involve a set of agreements and raise a number of contract issues. International NGOs enter into a set of agreements which are both similar to and different from those involved in for-profit foreign projects. International health programs may require contracts between the NGO, host government, donor or joint venture foreign investor, and a local in-country partner. These agreements may be general and non-binding or create specific obligations. Additionally, these agreements may set out program specifics and a plan of action or the timing of the project, creating aspirational goals rather than binding commitments.[14]

An initial and important contract is the donor commitment or funding agreement establishing a health development program.[15] The conditions placed on donated funds, and their purpose, often determine the ultimate structure of the NGO's programs.[16] While the examples discussed here indicate the use of agreements to formalize

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[14] An example of this type of agreement was used in the hospital construction example below conducted in China. The "Team Agreement," builds on the Principles of Cooperation signed four years earlier, summarizing the progress of the planing phase of the project and sets out goals and obligations for the construction phase.

[15] The agreement between the joint venture and international NGO establishing the program discussed below in Kazakstan, in contrast to the agreement with China noted above, is described as a "professional service agreement" and creates a comprehensive and specific contract between the funder and NGO.

[16] *Id.* The agreement sets initial program priorities, designates the NGO as the overall program coordinator and creates an alliance between the JV and NGO to heath education programs and other support to the host country.

the funding relationship, donors often give to NGOs without specific conditions on the use of funds. These relationships may start with a statement of understanding or cooperative assessment agreement. Where host governments initiate programs, the process may also involve a needs assessment, memo of understanding or general agreement to initiate or explore programs, either between the relevant national ministry or the local government partner.[17]

Just as the memo of understanding between the NGO and a donor usually precedes a more elaborate and specific arrangement, a formal agreement typically follows the initial expression of understanding between the NGO and host government. The NGO may enter into an agreement with a local government or public health entity that acts as a program partner or official contact. These host country agreements provide a number of benefits and delineate the relationship between the relevant parties. First, they may determine the status of the NGO in the host country, creating a legal personality and the ability to contract, sue and own property.[18] Second, such agreements can provide direct benefits for the NGO in support of its programs. The host country may agree to provide office space, transportation or housing for foreign employees in addition to its direct involvement in joint programs. Third, these agreements usually include tax, customs and regulatory exemptions in keeping with the

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[17] An initial agreement establishing the program in China described below creates a framework of obligations between the NGO and a host country medical university to develop plans for a pediatric treatment and medical training facility in China. The agreement with the medical university partner was then confirmed by the local municipal government.

[18] The agreement with local Chinese authorities includes the obligation to "accept [the NGO] as a private, non-profit entity whose purpose . . . is to assist with the planning and equipping of the new pediatric center and with the planning and conducting of teaching programs." *Id.* at art. 3(A). The agreement does not explicitly delimit the NGO's legal rights or status, but provides for the exemption of the NGO from taxes and government fees.

non-profit mission of the NGO.[19] Finally, host country agreements usually state the program objectives or commitments of the international NGO.[20]

IV. NGO HEALTH PROGRAMS AND INTERNATIONAL PROBLEMS[21]

The following examples of NGO international health programs show the similarities of such not-for-profit activities to those of traditional for-profit international investment. These examples also demonstrate the problems NGOs confront in international programs related to the public health development sector, as well as the difficulties specific to transitional and communist countries, such as China[22] and the former Soviet Union.[23] They also indicate that the problems faced by NGOs in foreign contexts may require focused investigation into the particular host country's treatment of international NGOs.

The international health programs conducted by NGOs involve such activities as direct emergency relief, provision of medical supplies and equipment, infrastructure development, operation of clinics and hospitals, medical training and health education. Funding sources vary and, as noted above, the particular funder may set parameters and conditions on these programs. Funding sources include U.S. Agency

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[19] For example, the Chinese authorities agreed to, "Be responsible to acquire exemption from all import duties, fiscal charges and customs duties for all program related materials provided by [the NGO]." *Id.* at art. 3(I).

[20] The NGO's obligations created by the agreement with China include providing technical expertise, securing medical equipment donations and assisting in the development of education and treatment programs. *Id.* at art. 2.

[21] These case studies derive from interviews with an official of a U.S. based NGO. Redacted gratitude is duly expressed by the author.

[22] *See generally* Cohen and Valentine, *Foreign Direct Investment in the Peoples Republic of China: Progress, Problems and Proposals*, 1 J. CHINESE L. 161.

[23] *See NGO Law in Brief in the New Independent States, World Learning Inc., Forum I, Winter 1995; Irish, NGOs and The Law: The Framework in Central and Eastern Europe*, CENTRAL EUROPEAN HEALTH & ENVIRONMENT MONITOR, VOL. 3, ISSUE 1, SPRING/SUMMER 1995.

for International Development (USAID) matching grants, private donations, gifts-in-kind of medical supplies, funding by international corporations participating in joint ventures or with investments in the host country, and corporate sponsorship.

The first type of program outlined below involves public health development funded by an international for-profit investor conducting a joint venture with a host country. This type of program is particularly significant in that it is related to, and established by, a for-profit international joint venture between a host government and a foreign investor. Additionally, the following examples include gift-in- kind medical supply shipments and the construction and operation of treatment and health education facilities and clinics funded by private donations and the host country.

A. Public Health Development in Former Soviet Republics:

Example 1: Kazakstan

The first example is of a public health development program funded by, and created as part of, a joint venture between an international company and the host government. The company contracted a U.S. based NGO to develop and coordinate a program to improve health care in one region of the country where the joint venture project is located. The program will spend over ten million dollars over a number of years, in one "oblast" (region) of Kazakstan. The program's objectives are to improve health care service delivery and infrastructure, develop a tuberculosis management system, improve maternal and child health services, develop pharmacies, and create a biomedical engineering capacity to service and maintain donated equipment.

The NGO seeks to accomplish these objectives by procuring and shipping medical supplies and equipment, training local health care personnel on new techniques and the use of advanced equipment, and improving medical facilities. The NGO also seeks to advance public health through improving health care administration and management, developing inventory management and control systems,

rationalizing the medical supplies distribution system, and aiding in the transition from a completely government-run medical system to a more market based health care industry.

The NGO's agreement with the joint venture is time-bound and operates as a business-like, service program.[24] It is common practice for the NGO to establish a host country agreement. In this case, however, the NGO was contracted by the joint venture. Consequently, the NGO did not consider it necessary to create a host country agreement, since it could operate under the framework of the joint venture agreement made between the international corporation and the host government. Despite good intentions, this has turned out to be a problematic situation due to the very different natures of their activities; with the corporation drilling for, and exporting, oil for profit and the NGO developing health care infrastructure on a non-profit basis. This creates constant problems and challenges to the NGO in its operations in the host country. Thus, the NGO does not have a formal agreement with the host country establishing its status, legal rights, program related benefits or exemptions.

It is common practice for the NGO to require a country agreement before beginning a program, which usually are initiated by the host government or its health ministry. The lack of a direct host country agreement and the solicitation of the program by the joint venture make this example unique and have created significant uncertainty.

The fact that the host government does not have procedures in place to sufficiently recognize international NGOs compounds the difficulties resulting from the lack of a direct NGO-host country agreement. Host country agreements are also important because they may include host country obligations to provide contributions such as housing for expatriate staff, office space for the NGO, utilities, and exemption from sales and personal income taxes and customs duties for imported goods. Without a formal agreement the NGO has no guarantee the host country will provide these benefits. Or where these

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[24] *Supra* note 15.

benefits are informally provided, the NGO has no guarantee that they will continue, creating uncertainty and difficulties for the NGO.

The government of Kazakstan has informally provided a number of benefits, including tax exemptions, customs exemptions and the free use of office space. Although the government has not yet demanded taxes or customs duties, technically, it could, and various local tax and airport authorities periodically make statements to that effect. The local administration has, however, made a retroactive demand for rent on the office space provided free of charge since the program began in 1992. For an NGO, unexpected expenses such as this make it very difficult for the organization to continue its humanitarian work in the area. This highlights the precarious status of international NGOs without a formal host country agreement or operating in a country which lacks procedures to recognize international NGOs.

Kazakstan is a relatively new country with a limited legal basis for international NGOs, and scant historical experience with the concept of NGOs. The host country may see foreign NGOs and foreign for-profit entities alike and attempt to encourage revenue from the activities of both, especially in this instance where the NGO's activities were initiated by a for-profit joint venture.

Initially, the NGO sought official registration as a non-profit organization in Kazakstan. The government required the submission of numerous documents including articles of incorporation and non-profit status certification from the home country, both translated into Russian and notarized by the country and state of incorporation as well as the U.S. State Department. Certification of the accurate translation of these documents was also required. Recently, the host country's laws changed, and they now require all official documents to be resubmitted in the host country's new official language. The host country also requires background information on the NGO and its programs, and has recently asked for additional documents including the professional service agreement and other contracts related to the establishment of the program.

This entire process is conducted *ad hoc* for this particular NGO, because the country has not established sufficient procedure for

NGO recognition. Although Kazakstan recently passed a presidential decree making recognition of international NGOs possible,[25] the Ministry of Justice has yet to establish a set procedure to recognize international NGOs.

Kazakstan does have in place a system to recognize international NGOs that are on a list maintained by the U.S. Embassy in Atyrau, but that list only includes NGOs conducting programs funded by USAID, creating another obstacle since this NGO's programs are privately funded. Although the NGO is not on the U.S. Embassy list, the NGO has successfully convinced the host country that the list is irrelevant to the question of the NGO's status.

An additional impediment to the creation of an agreement between the government and the NGO has been the fact that, until recently, recognition required a special act of parliament or an executive decree. Unfortunately, until a recent presidential decree,[26] such recognition was difficult in that parliament had been disbanded and the president engaged with other, arguably more pressing matters. The interim solution to the problem of recognition or an agreement at the national level has been *ad hoc* regional or local registration. Such registration in the oblast is temporary, and is renewed every year on a discretionary basis. It allows exemption from taxes on a local basis.

The absence of an agreement or recognition has been the biggest overall problem for the NGO's program in Kazakstan. The lack of registration has caused a series of associated smaller problems, and given rise to potential problems and uncertainty. Smaller related problems include the host country's authorities occasionally asking employees to pay income tax, at a high rate required of expatriates; such taxes are not budgeted for nor expected by the NGO. The NGO does not have the resources to avoid income taxes by rotating employees periodically, as foreign corporations typically do.

An additional problem is that the NGO cannot buy property, such as apartments or automobiles. The NGO must buy such items in

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[25] *Presidential Provision*, *supra* note 11.

[26] *Id.*

the name of individual employees or in the name of the local branch of the Ministry of Health. This creates added liability for the NGO's employees and bureaucratic hassles to obtain power of attorney to allow use of the property bought in the name of the host country. At the end of the program, the property acquired for the program will be donated to the government.

Another uncertainty involves customs duties that the host country might demand on the millions of dollars worth of donated supplies shipped to the host country. This would amount to a significant amount of money not foreseen by the program's budget. There also exists the potential for harassment for fees at the airport when shipments arrive, or where exemption from fees and taxes is in question. Without an agreement creating legal recognition and exemptions, there is less ground on which to resist demands for fees and taxes, and no guarantee such informal exemptions will continue.

A potentially significant problem relating to the lack of an agreement will arise in the event of any legal dispute. It is questionable whether the NGO has the capacity to sue or obtain any legal recourse against contractors, service providers or others. Nevertheless, it is particularly worrisome considering the frequency of contract breach in Kazakstan. Examples of contract problems include the leasing of warehouse space, where the lessor refused to accept the negotiated and agreed price, and a local service provider who agreed to fix copy machines but has failed to perform on the contract. Without some form of recognition, the NGO has questionable legal recourse against these and other contract violations.

The case study of Kazakstan suggests the importance of a host country agreement where foreign laws do not recognize international NGOs or do not provide a procedure for recognizing them. It also shows the importance of recognition and legal personality to international NGOs. Without a host country agreement or laws providing for recognition of international NGOs, NGOs may be subject to the whim of the government and new requirements or demands. Without such recognition, the NGO-host government relationship may be in flux, providing little protection to the NGO. By no means is a host country agreement suggested as a cure-all. For

example, an agreement or registration may not solve uncertainties and risks, nor provide real protection against political changes and instability. Nonetheless, it would allow an NGO to hedge itself against foreseeable risks.

Example 2: Uzbekistan

The second example of an NGO international health program was initiated by a recently created long term joint venture between an international mining corporation and the government of Uzbekistan. This program involved the shipment of over five million U.S. dollars worth of vaccine and general medical supplies donated by U.S. corporations. The joint venture paid the NGO to manage the handling and transportation of the shipments, as well as to conduct a formal assessment of further health care needs in the host country.

The delivery of donated medical supplies usually involves a sign off agreement from the Ministry of Health of the host country to assure the proper use of the donated supplies. This creates a government obligation to use the supplies appropriately. Such agreements may require a follow-up report by the ministry, if requested by the donating NGO. Such shipment programs create a significant follow-up issue for the international NGO since it must assure the appropriate use of the donated medicine and supplies.[27] The ongoing involvement of the joint venture and the NGO in health programs will provide oversight to assure the proper use of the donated material.

In this instance, the transportation of the shipment was provided free of charge through a U.S. Department of Defense (DOD) humanitarian assistance program. The DOD program requires a letter from the host country stating that landing and airport fees will be waived for the humanitarian assistance flight. In addition, the NGO requires that the same letter waive customs fees. Thus, the contracts involved with this program include an agreement between the joint

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[27] *See* MacKenzie, *supra* note 12.

venture and NGO and a sign off letter from the host government.

This example also involves an assessment of tuberculosis and dentistry needs and the development of related programs. An NGO assessment team first evaluates the current level of training, technology, and treatment, and then locates in-country partners and project sites. The assessment team then reports on its findings and proposes programs and the level of NGO involvement. Such involvement will then be formalized by a long term and detailed agreement with the joint venture corporation. The NGO will then also create a host country agreement indicating the type of support or participation of the host government and outlining the host country's obligations and the NGO's duties.

Although in the Kazakstan example above the health development programs were established as part of the joint venture arrangement with the host country, the program here was initiated voluntarily as part of a corporate citizenship effort. These examples show how public health development by international NGOs can be a part of international joint venture strategy to develop good will or serve as an added incentive to create a joint venture. The involvement of an international NGO to conduct public health development programs may arise as a condition of a joint venture deal or voluntarily afterwards. Such programs may create a positive corporate image, assure the health of local workers, protect local and visiting expatriate workers from contagious disease, and assure access to medical and emergency facilities for local workers and expatriates.

The program initiated in Uzbekistan demonstrates the issues involved in providing direct humanitarian relief. It also shows how, from the initial phases of such programs, international NGOs structure their foreign activities and interaction with the host government to reduce uncertainties and build a mutually beneficial and clear long-term relationship with the host government. NGO international health programs established by a joint venture may be considered, indirectly, part of a foreign investment strategy, and raise investment like issue for the NGO directly.

Example 3: Building a Children's Hospital in China.

In this example, the NGO, in partnership with a local medical school and the municipal government, is constructing a state-of-the-art pediatric treatment and medical training facility. Involving a multi million dollar investment of donated funds and medical equipment, the NGO will design the facility, equip it and train its staff.

The hospital will serve as a referral center for advanced pediatric and tertiary care and provide a training facility for the local medical school. The hospital will also host foreign medical volunteers who will introduce pediatric treatment techniques and the latest medical equipment.

In this example, the parallels between for-profit and non-profit investment are evident. The size of the project, the nature of the activities and the partnership with the host government is similar to those involved in for-profit investment activities. One example of this involves the NGOs name. A local entity began using the NGO's recognized and well-respected name, without permission, to fraudulently raise funds for itself. The NGO was forced to change the name of its in-country group to separate itself from the fraudulent Chinese fund-raisers. This problem is similar to trademark or servicemark protection problems that for-profit investors confront in foreign countries. One obvious, and most significant, difference between a for-profit and non-profit investor in this example is that the NGO will not receive revenue from the project.

V. ISSUES FOR NGOS UNDER INTERNATIONAL COMMERCIAL LAW

As indicated by the above case studies, NGOs face unique problems that may exceed those of for-profit investors. Although international law, domestic host country law or the host country-NGO agreement may resolve or mitigate some of these problems, there remain significant sources of uncertainty for international NGOs. A carefully drafted host country agreement and dispute resolution arrangement that recognizes the inadequacies of international commercial law and includes the possibility of arbitration provides an

essential mechanism for mitigating these uncertainties.

As suggested above, international law does not incorporate provisions governing the status and protection of NGOs.[28] There exist, however, a number of instruments relevant to the problems faced by international NGOs generally and those engaged in commercial-like projects.[29] These instruments provide a measure of relief, yet may also be difficult to apply to international NGO activities. First, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations[30] (hereinafter European Convention) obligates ratifying states to recognize international NGOs and provide them, as a matter of right, the protections and status they enjoy in their home countries.[31] Entering into force in 1991, the European Convention has less than ten states as parties, all members of the Council of Europe. States which are not members of the Council may accede to the European Convention with the approval of the Council of Europe.[32] Thus, while this convention has few state parties, it may become an internationally accepted instrument and provide a standard for the recognition of the legal personality of NGOs.[33]

An additional set of international agreements relevant to the protection and recognition of NGOs is the network of Bilateral Investment Treaties (BITs) established to provide national treatment

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[28] YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 327 (1991).

[29] *See generally id.* at 331-36.

[30] *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, 1986 EUR. Y.B. (Council of Eur.) 34, 35.

[30] *Id.*, art.2 at 35.

[31] *Id.*

[32] *Id.*, art. 7 at 37.

[33] The U.S.-Iran Claims Tribunal reached a decision in *International Schools Services, inc. v. Iranian Copper Industries* which accords with the European Convention's core principle that NGOs and their legal capacity are governed by the laws of the place of formation. 5 U.S.-IRAN CLAIMS TRIBUNAL REPORTS, 338, 345; *see*, Goldman, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116.

to foreign investors in accordance with international standards.[34] Article 1 of the prototypical BIT defines "company" as:

> any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization.[35]

This provision explicitly covers NGOs and is particularly significant given the wide adoption of BITs,[36] and considering that some foreign NGO laws place international agreements such as these above domestic legislation on NGOs. For example, Uzbekistan's law "Concerning Social Organizations" provides:

> [i]f an international agreement of the Republic of Uzbekistan establishes other rules than those contained in this Law, the rules of the international agreement take precedence.[37]

Although, as of June 1994, the United States does not have a BIT with Uzbekistan, it has ratified one with Kazakstan, and signed one with Russia.[38] Regardless of provisions in foreign NGO laws that give primacy to international agreements, BITs offer international

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[34] *See*, Eleanor Roberts Lewis, *The United States Bilateral Investment Treaty Program: Protection for U.S. Investors Overseas*, THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 1994, 127 art. 2 (PLI Corp. Law & Practice Handbook Series No. 863, 1994).

[35] *Id.* at 134.

[36] Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L. L. 655 (1990).

[37] Law Concerning Social Organizations in the Republic of Uzbekistan, adopted Feb 15, 1991, art. 26.

[38] Lewis, *supra* note 34, at 132.

NGOs an important source of protection that accords with the standards reflected in the European Convention and international arbitral decisions.

The prototypical BIT also contains provisions for the settlement of investment disputes.[39] Article 9(1) defines investment disputes to include disputes between individuals or companies and a state party.[40] Further, Article 9(2) opens host country courts to the foreign investor, or allows resolution as previously agreed, when a dispute arises.[41] If a dispute is not submitted for resolution under Article 9(2), and three months has elapsed, the foreign investor may submit the dispute to arbitration at the International Center for the Settlement of Investment Disputes (ICSID), in accordance with UNCITRAL Arbitration Rules or under another set of arbitration rules or institutions[42] as agreed by the parties to the dispute.[43]

Significantly, article 9(4) of the prototypical BIT operates as an explicit consent of the states party to the BIT to submit the dispute to arbitration.[44] This consent satisfies the ICSID Convention's requirement for a "written consent" and the requirement of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for an "agreement in writing".[45] These provisions give foreign NGOs an important right to access host country courts or to submit disputes to international arbitration.

This protection is especially significant given the lack of legal status and insufficient protections NGOs often face in host countries. Arbitration offers international NGOs an important avenue of recourse in disputes with host countries, especially where access to courts is unavailable or the parties seek a less contentious means of dispute

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[39] Ahmed Sadek El-Kosheri, *ICSID Arbitration and Developing Countries*, 8 ICSID REV. - FOREIGN INVESTMENT L. J. 107 (1993).

[40] Lewis, *supra* note 34, art. 9(1).

[41] *Id.* art. 9(2).

[42] *See* Horacio A. Grigera Naon, *ICC Arbitration and Developing Countries*, 8 ICSID REV. - FOREIGN INVESTMENT L. J. 116 (1993).

[43] Lewis, *supra* note 34, art. 9(3).

[44] *Id.* art. 9(4).

[45] *Id.*

resolution. Often, the protection of an amicable relationship between an NGO and a host government requires a less confrontational method of dispute resolution such as arbitration. Thus, arbitration may offer a viable option where host state courts, home state espousal and other forums fail to provide redress.[46]

The system of international arbitration, however, established for commercial transactions and disputes arising from international agreements may create challenges for international NGOs. Important provisions from the ICSID and New York Conventions demonstrate the problems NGOs may encounter related to the applicability of international commercial arbitration conventions. Additionally, similar to for-profit investors, NGOs must overcome host country sovereign immunity, which insulates governments from judicial decisions enforcing arbitral awards or NGO rights, and the difficulty of enforcing an arbitral award against a foreign government in general.

First, the ICSID Convention offers a unique venue for international investors that have disputes with host states. The Convention establishes, under the aegis of the World Bank, an institutional mechanism available to foreign investors and host governments seeking to arbitrate international investment related disputes. ICSID is available to parties that have ratified the Convention and their nationals, both natural and juridical.[47] ICSID arbitral awards against foreign governments are frequently accepted by host governments due to ICSID's association with the World Bank.[48]

Although no NGO has been (as of 1993) a party to a dispute before an ICSID arbitral panel, ICSID arbitration may offer NGOs a means of resolving investment related disputes.[49] Critical to the applicability of the ICSID Convention to international NGO activities

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[46] MacKenzie, *supra* note 12 at 218.

[47] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, art. 1(2) and 25(2), 17 U.S.T. 1273, 1280, 575 U.N.T.S. 162, 174 [hereinafter Convention].

[48] MacKenzie, *supra* note 12 at 221, 232.

[49] *Id.* at 219.

is the definition of "investment" as used to determine ICSID jurisdiction.[50] Article 25(1) of the ICSID Convention, providing the basis for jurisdiction, thus reads: "[t]he jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a contracting state . . . and a national of another contracting state, which the parties to the dispute consent in writing to submit to the center. . . . "[51] While this provision would seem to cover much of the international activity of NGOs, especially where it is of a commercial or contractual nature, ICSID tribunals have not given an elaborate definition of what constitutes an "investment dispute". It would likely be given a broad definition to allow ICSID jurisdiction over international NGO activities.[52]

Although the Convention does not define the extent of the term "investment", it may be interpreted to include international NGOs. It has been observed that, as a precaution, NGOs relying on an ICSID arbitration clauses in contracts with foreign governments should explicitly define the term "investment" in the contract to include the NGOs activities.[53] Although including such a definition in an agreement is important, it will not alone establish ICSID jurisdiction, and the parties must have at least some form of economic relationship.[54] This aspect of international commercial arbitration highlights the difficulties international NGOs may face, and shows the need to carefully structure arbitration clauses,[55] in order to account for

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[50] *Id.* at 223.

[51] *Id.* at 222.

[52] MacKenzie, *supra* note 12, at 208-212. *See also* Rand, Hornick and Friedland, *ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction*, 19 N.Y.U. J. INT'L L. & POL. 33, 33-38.

[53] Id. at 208-9.

[54] *Id.* at 209.

[55] *See generally*, Lecuyer-Thieffry and Thieffry, *Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and other Processes*, 45 BUS. L. 577 (1990); Stephen A. Hochman, *Model Dispute Resolution Provisions for Use in Commercial Agreements Between Parties With Equal Bargaining Power*, C976 ALI-ABA 189 (1994); Emmanuel Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 477 PLI/Comm 33, 3 ICSID REV. 1988; Dana Freyer, *Alternative Dispute Resolution: How to Use it to Your*

the gaps in international private investment when applied to NGOs.

A second issue for international NGOs considering arbitration concerns the enforcement of arbitral awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards assures the enforcement of arbitral awards from foreign arbitral tribunals in states ratifying the Convention. Of particular concern for international NGOs seeking the enforcement of foreign arbitral awards is Article 1(3), which allows state parties to declare reservations that may either require reciprocity or limit the Convention: "to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."[56] Of the approximately one hundred nations ratifying the New York Convention, some twenty-five have made the commercial reservation allowed under article 1(3), including the United States[57] and China.[58] A narrow definition of "commercial" by domestic courts enforcing an arbitral award under the New York Convention, as allowed by Article 1(3), limits the applicability of the Convention and may undermine the ability of NGOs to rely on it for the enforcement of foreign arbitral awards.[59] In contrast, BITs do not necessarily allow such commercial

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Advantage, International Commercial Arbitration Clause Checklist, C976 ALI-ABA 413 (1994).

[56] Convention of the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, art. 1(3), 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. *See also* 9 USC § 202.

[57] The U.S. defines commerce broadly, narrowing the scope of the U.S. commercial reservation, 9 U.S.C § 1; *see also*, Joseph T. McLaughlin, Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts, 477 PLI/Comm. 275, 278.

[58] *See*, Ge Liu and Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539 (1995); Bruce R. Schulberg, Note, *China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards*, 3 J. CHINESE L. 117, 125 (1989).

[59] Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717, 721 (1987).

reservations.[60]

A similar problem may arise in respect to NGOs under UNCITRAL's Model Law on International Commercial Arbitration,[61] incorporated into some domestic legislation governing arbitration. The Model Law is limited in scope to "all relationships of a commercial nature . . . ."[62] This provision broadens the term "commercial", in order to minimize varying domestic interpretations of the term, as applied under the New York Convention, and expand the enforceability of arbitral awards.[63]

Thus, important considerations for international NGOs include whether the host country has adopted the ICSID and New York Conventions, or incorporated the Model Law into its legislation. Also significant is whether the host country has made a commercial reservation to the New York Convention and defines "commercial" broadly in the event that it has made such a reservation. Depending on the answers to these questions, NGOs may encounter less difficulty obtaining redress through arbitration or enforcing an arbitral award. Ideally, the NGO will take such circumstances into account and include an arbitration clause in a host country agreement.

One final issue important to the enforcement of arbitral awards against a foreign government concerns the host government's sovereign immunity. While comparative laws on sovereign immunity vary, the United States considers an agreement to arbitrate an implicit waiver of sovereign immunity under the Foreign Sovereign Immunities Act (FSIA).[64] In order to enforce an arbitral award in the U.S. against a foreign country, the agreement to arbitrate, the legal relationship between the parties or the dispute itself must have some connection

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[60] Schulberg, *supra* note 58, at 119.

[61] U.N. GAOR 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, 24 I.L.M. 1302, Chapter VIII.

[62] *Id.* at § 1315, *See also* Michael Durgavich, Comment, *Resolving Disputes Arising Out of the Persian Gulf War: Independent Enforceability of International Agreements to Arbitrate*, 22 CAL. W. INT'L L.J. 389, 404, 428.

[63] Ungar, *supra* note 59, at 737.

[64] 28 USC sec. 1605a(6).

to the United States.[65]

The FSIA is similar in this respect to the European Convention on State Immunity. The Convention also treats arbitral agreements as waivers of sovereign immunity.[66] This waiver of sovreign immunity by agreement to arbitrate significantly increases the value of a host government's agreement to submit disputes to arbitration, since it cannot invoke sovereign immunity to defeat the arbitration or enforcement of an arbitral award. Additionally, the FSIA allows attachment of a foreign state's property used for commercial activity under certain circumstances, making sovereign immunity less of a bar to collection on an arbitral award against a foreign, host government.[67]

CONCLUSION

The case studies and discussion show the difficulties NGOs confront when engaged in international projects. The program examples suggest the similarities NGOs have with for-profit investors, and that international NGO programs may be directly linked to foreign investment projects. These examples highlight the importance of legal recognition and dispute resolution procedures.

This paper suggests a number of things NGOs might consider when structuring their international programs. First, the NGO should investigate the relevant provisions of the host country's laws relating to international NGOs. Issues of particular significance include whether the local laws provide for recognition of the NGO's legal status and tax or other exemptions. Second, the NGO should consider whether the host government has ratified any of the international agreements relevant to international NGOs discussed

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[65] *Id.*

[66] COUNCIL OF EUROPE, EUROPEAN TREATY SERIES NO. 74, EUROPEAN CONVENTION ON STATE IMMUNITY AND ADDITIONAL PROTOCOL (CONVENTION EUROPÉENNE SUR L'IMMUNITÉ DES ÉTATS ET PROTOCOLE ADDITIONNEL) art. 12 (1972).

[67] 28 USC sec. 1610.

here.

Third, where relevant international agreements exist, the NGO should consider whether reservations have been made and the effect of the agreements and reservations in host country courts, especially their applicability to international NGOs. Fourth, even where host country NGO laws and appropriate international agreements exist, a host country agreement provides added protection, especially where it incorporates an arbitration clause. Finally, where an arbitration clause is incorporated, whether in the host country agreement or other contracts, it should be tailored to anticipate the difficulties NGOs might face in applying international arbitration instruments to their disputes and activities.